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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

DAVID HULL, Plaintiff and Appellant, v. SAFEWAY, INC., Defendant and Respondent.	D047973 (Super. Ct. No. GIC 849164)

APPEAL from a judgment of the Superior Court of San Diego County, Ronald S. Prager, Judge. Affirmed.

David Hull brought this action against Safeway, Inc. (Safeway) for negligence and violations of the Unfair Competition Law (Bus. & Prof. Code, § 17200 et seq. (the UCL)) and the Consumers Legal Remedies Act (Civ. Code, § 1750 et seq. (the CLRA)), arising out of Safeway's practice of placing anti-theft tags on the packaging of the over-the-counter medications it sells. He appeals a judgment entered against him after the superior court sustained Safeway's demurrer to his claims without leave to amend, contending that

his allegations are sufficient to state the asserted causes of action. We find his arguments unavailing and affirm.

FACTUAL AND PROCEDURAL BACKGROUND

In accordance with the principles governing our review of a ruling sustaining a demurrer, the following factual recitation is taken from the allegations of Hull's first amended complaint (*McBride v. Boughton* (2004) 123 Cal.App.4th 379, 382, fn. 1).

In May 2005, Hull purchased an over-the-counter medication (Sudafed) from a Safeway store. Because Safeway had placed a non-removable, anti-theft tag on the packaging for the Sudafed, Hull was unable to read the manufacturer's warnings printed thereon about the proper use of the drug (such as that the drug should not be used by someone who suffers from high blood pressure or who takes a prescription monoamine oxidase inhibitor). Because Hull could not read the warnings, he felt he could not safely use the Sudafed.

Hull filed this action against Safeway in June 2005, on his own behalf as well as on behalf of all others who purchased over-the-counter medications from Safeway in the preceding four years, contending that Safeway's obliteration of the warnings precluded the proposed class of plaintiffs from safely using the medications, either leaving them with unusable goods (as in Hull's case) or possibly causing them to have adverse reactions to the medications, which they would not have had if they had been able to read the warnings. The original complaint asserted causes of action for strict liability, negligence, violations of the CLRA and for injunctive relief under the UCL.

After Safeway filed a demurrer to the complaint, Hull filed a first amended complaint. Safeway again demurred, contending that (1) Hull had not alleged any actual injury and thus could not establish causation or damages in support of his claims for strict liability and negligence; (2) Hull lacked standing to assert a claim under the CLRA because he had not alleged that he suffered any damage as a result of its conduct, he had failed to give the statutorily-required notice before bringing suit under the CLRA and Safeway's alleged conduct did not violate the statute; and (3) Hull's claim under the UCL failed because he did not allege that he suffered any injury in fact arising therefrom. Safeway also demurred to the first amended complaint's class action allegations. After briefing and oral argument, the court sustained Safeway's demurrers to all the causes of action, as well as the class action allegations, without leave to amend. Hull appeals.

DISCUSSION

1. *Standard of Review*

On appeal from a judgment after a demurrer is sustained without leave to amend, we review the trial court's ruling de novo, exercising our independent judgment on whether the complaint states a cause of action on any available legal theory. (*Lazar v. Hertz Corp.* (1999) 69 Cal.App.4th 1494, 1501; *Rakestraw v. California Physicians' Service* (2000) 81 Cal.App.4th 39, 43.) We assume the truth of all facts properly pleaded, as well as facts inferable therefrom, and give the complaint a reasonable interpretation by reading it as a whole and all its parts in their context. (See *Morillion v. Royal Packing Co.* (2000) 22 Cal.4th 575, 579.) However, we give no credit to allegations that merely

set forth contentions or legal conclusions. (*Financial Corp. of America v. Wilburn* (1987) 189 Cal.App.3d 764, 768-769.)

2. *Negligence*

Hull's negligence cause of action alleges that Safeway owed Hull and other members of the proposed class a duty to use reasonable efforts to package and label the over-the-counter medications it sells and that it breached this duty by placing its anti-theft tags over the warnings portion of the products' labels. Hull essentially concedes that these allegations are insufficient to state a claim for common law negligence, but contends that we should nonetheless construe the allegations of the complaint (which include allegations that Safeway's conduct violates various statutes) as stating a claim for negligence per se. Hull's argument, however, misconstrues the nature of negligence per se.

Negligence per se is not a tort separate and apart from common law negligence, but is instead a statutorily-created presumption that affects the parties' respective burdens of proof at trial. (Evid. Code, § 669.) The statute provides that there is a presumption of negligence in favor of a plaintiff who is able to establish that: (1) the defendant violated a statute, ordinance or regulation of a public entity; (2) the statutory violation proximately caused death or injury to the plaintiff's person or property; (3) the death or injury resulted from an occurrence, the nature of which the statute, ordinance or regulation was designed to prevent; and (4) the person who died or whose person or property was injured was within the class of persons for whose protection the statute, ordinance or regulation was adopted. (Evid. Code, § 669, subd. (a); *Spates v. Dameron Hosp. Assn.* (2003) 114 Cal.App.4th 208, 218.)

A plaintiff who seeks to make the showing necessary to trigger the statutory presumption "is not attempting to pursue a private cause of action for violation of the statute; rather, he is pursuing a negligence action and is relying upon the violation of a statute, ordinance, or regulation to establish [the duty and breach elements of the negligence claim]." (*California Service Station Etc. Assn. v. American Home Assurance Co.* (1998) 62 Cal.App.4th 1166, 1178, quoting *Sierra-Bay Fed. Land Bank Assn. v. Superior Court* (1991) 227 Cal.App.3d 318, 333-334.) Thus, mere allegations that conduct violates a statute will not suffice to support a negligence claim; a plaintiff must also allege facts establishing the causation and damage elements of the cause of action. (Evid. Code, § 669, subd. (a).)

As to the damage element of the negligence claim, Hull contends that his allegations establish that Safeway's conduct in affixing labels to the warnings portion of the medication packaging "caused injury to his property." The difficulty with this argument is that the allegations also make clear that Safeway affixed the labels *before Hull purchased the Sudafed*, i.e., at a time when the product was not his; these allegations thus belie the contention that Safeway's conduct caused damage to Hull's property.

Hull also suggests that he suffered financial loss because he purchased a product that was rendered unusable, and thus worthless, by the placement of the security tag. This argument is also unavailing. The fact that the exterior warnings were obliterated (a circumstance that Hull would have noticed if he had tried to read the warnings on the package before purchasing the Sudafed) did not render the medication inside worthless. Further, the warnings for product usage are frequently available on the manufacturers' websites (see, for

example, http://www.sudafed.com/products/childrens_cold_and_cough.html). Finally, even if Hull found that he could not use the Sudafed because of disclosed contraindications, he does not explain how he was damaged thereby (such as might be the case if Safeway refused to allow him to return the product for a refund, something that Hull has neither alleged nor suggested that he can amend to allege).

For these reasons, we conclude that the trial court correctly ruled that Hull had not alleged injury sufficient to support a claim for negligence.

3. *Violation of the CLRA*

The CLRA provides in relevant part:

> "The following unfair methods of competition and unfair or deceptive acts or practices undertaken by any person in a transaction intended to result or which results in the sale or lease of goods or services to any consumer are unlawful:
>
> . . . . . .
>
> (5) Representing that goods . . . have . . . approval, characteristics, ingredients, uses [or] benefits . . . which they do not have[.]" (Civ. Code, § 1770, subd. (a).)
>
> "Any consumer *who suffers any damage* as a result of the use or employment by any person of a method, act, or practice declared to be unlawful by Section 1770 may bring an action against that person to recover or obtain any of the following:
>
> (1) Actual damages . . . .
>
> (2) An order enjoining the methods, acts, or practices.
>
> (3) Restitution of property.
>
> (4) Punitive damages.

(5) Any other relief that the court deems proper." (Civ. Code, § 1780, subd. (a), italics added.)

The superior court sustained Safeway's demurrer to Hull's CLRA cause of action in part based on its conclusion that in the absence of allegations that Hull used the product, the first amended complaint failed to allege damage and thus Hull lacked standing to pursue this statutory claim. Hull contends that the court erred in finding that he was required to use the product, arguing that he has alleged damage consisting of Safeway's infringement on his "right to be free of any 'method, service or practice declared to be unlawful by [Civil Code section 1770].'" We disagree that Hull's allegations are sufficient to state a claim under the CLRA.

Even if we assume, without deciding, that the allegations regarding Safeway's conduct are sufficient to plead a violation of the CLRA, the statutory language is clear that a plaintiff seeking to successfully assert a cause of action for such violations must allege and prove actual damages. (Civ. Code, § 1780, subd. (a); also *Wilens v. TD Waterhouse Group, Inc.* (2003) 120 Cal.App.4th 746, 754 [recognizing that the CLRA "does not create an automatic award of statutory damages upon proof of an unlawful act," but provides relief only "to those who suffer damage, making causation a necessary element of proof"], citing *Massachusetts Mutual Life Ins. Co. v. Superior Court* (2002) 97 Cal.App.4th 1282, 1292.) Hull, however, relies on language in the California Supreme Court's decision in *Kagan v. Gibraltar Sav. & Loan Assn.* (1984) 35 Cal.3d 582 (*Kagan*) for the proposition that the "damage" requirement of the statutory claim is

satisfied by allegations similar to those asserted here. We conclude that Hull's reliance on *Kagan* is misplaced.

In *Kagan*, the plaintiff brought an action, individually and as a representative of a proposed class of bank customers, against the bank for violating the CLRA by falsely representing in its promotional brochures that it would not charge its customers management fees relating to their individual retirement accounts. In accordance with the notice provisions of the CLRA, the plaintiff informed the bank of the violations, demanded that it rectify the violations within 30 days and informed it that she would file a lawsuit against it if it failed to do so. (*Kagan, supra*, 35 Cal.3d at p. 588-589.) Three weeks later, the bank notified the plaintiff that it had not deducted the management fee from her account and had refunded the fees it previously charged her husband, although it did not specify that it was taking similar steps as to its other customers. (*Id*. at p. 589.)

The plaintiff filed suit, seeking in part actual damages for deducted fees and declaratory and injunctive relief precluding future fee deductions. (*Kagan, supra,* 35 Cal.3d at p. 589.) The bank thereafter brought a motion to have the court determine that the action lacked merit because the plaintiff had not suffered any damage as required by Civil Code section 1780. (*Kagan, supra*, 35 Cal.3d at p. 589.) The trial court granted the motion, concluding that the plaintiff had not suffered any injury or sustained any damage cognizable under the CLRA. (*Ibid*.) On the plaintiff's appeal, the Supreme Court reversed, holding that a prospective defendant could not avert a class action under the CLRA by "picking off" prospective plaintiffs one-by-one and that the bank's "exemption of [the] plaintiff from the imposition of the trustee fee [did] not render her unfit per se to

represent the class." (*Kagan, supra*, 35 Cal.3d at pp. 593, 595.) The *Kagan* court explained that "a prospective defendant receiving notice of a grievance which affects a class of consumers can avert a subsequent class action only by remedying the contested practices as to all affected consumers." (*Id*. at p. 591.)

We acknowledge that certain language in *Kagan* suggests the mere occurrence of conduct in violation of the CLRA alone will support a viable cause of action, even where the plaintiff does not suffer any actual injury. (*Kagan, supra*, 35 Cal.3d at p. 593.) However, absent a more clear directive from the high court, we conclude that *Kagan* does not require such a conclusion, which would effectively eviscerate the statutory language requiring that the plaintiff suffer "damage as a result" of a CLRA violation. (Civ. Code, § 1780, subd. (a); *Wilens v. TD Waterhouse Group, Inc., supra,* 120 Cal.App.4th at p. 755.)

As discussed above in connection with the analysis of Hull's negligence cause of action, Hull has not alleged any actual damage resulting from Safeway's alleged violations of the CLRA. Thus, Hull has not alleged facts sufficient to state the elements of a CLRA claim.

4. *Violation of the UCL*

The UCL defines "unlawful competition" to include an "unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising[.]" (Bus. & Prof. Code, § 17200.) Originally, any person could prosecute an action under the UCL on behalf of the general public, regardless of whether that person suffered any injury as a result of the violations thereof. (*Californians for Disability Rights v. Mervyn's, LLC* (2006) 39 Cal.4th 223, 227 (*Mervyn's*).) However, after

California voters passed Proposition 64 in November 2004, only those persons who suffered "injury in fact" and "loss of money or property" as a result of the alleged unfair competition can assert a viable UCL claim. (Bus. & Prof. Code, § 17204, amended by Prop. 64, § 3; *Mervyn's, supra*, 39 Cal.4th at pp. 227, 232-233 ["[i]n effect, [Bus. & Prof. Code, § 17203], as amended, withdraws the standing of persons who have not been harmed to represent those who have".])

Here, the superior court sustained Safeway's demurrer to the UCL cause of action on the ground that because Hull did not allege that he used the product, the complaint failed to allege "injury in fact," but instead a hypothetical or potential injury. While we do not necessarily agree with the superior court's apparent conclusion that Hull had to suffer physical damage in order to assert a UCL claim, we do agree, for the reasons discussed in our analysis of the viability of Hull's negligence cause of action above, that the first amended complaint does not allege any damages resulting from the asserted unfair competition and thus that Hull's UCL cause of action fails.

5. *Leave to Amend*

Hull requests that if we find his pleadings deficient in any respect, we remand the matter with directions that he be given leave to amend to cure such deficiency. However, he does not proffer any argument as to how he could amend the complaint to allege facts that would allow him to proceed on his claims, nor do we discern how he would be able to do so. Hull bears the burden of establishing a reasonable possibility that the defects in his pleading are curable by amendment, but has not met that burden. (*Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081.)

DISPOSITION

The judgment is affirmed. Safeway is entitled to recover its costs on appeal.

McINTYRE, J.

WE CONCUR:

McCONNELL, P. J.

NARES, J.